United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

ORIGINAL

74-1823

United States Court of Appeals
FOR THE SECOND CIRCUIT

B/Pls

VERMONT FOOD INDUSTRIES, INC.,

Plaintiff-Appellee,

against

RALSTON PURINA COMPANY,

Defendant-Appellant.

PETITION FOR REHEARING WITH SUGGESTED REHEARING *IN BANC*

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1823
D.Vt. Civil Action
File No. 6753

VERMONT FOOD INDUSTRIES, INC.,

Plaintiff-Appellee,

against

RALSTON PURINA COMPANY,

Defendant-Appellant.

PETITION FOR REHEARING WITH SUGGESTED REHEARING *IN BANC*

Ralston Purina Company, defendant-appellant, petitions for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on the ground that the Court misstated, overlooked and misapprehended facts which, if properly considered, would have led to reversal of the judgment in whole or in part.

Why should this Court devote any further attention to a judgment of $298,870 against the world's largest poultry feed manufacturer? Because, like the smallest Vermont chicken farmer, Ralston Purina is entitled to a determination by this Court based on an accurate statement and consideration of all material facts. Since the facts relied on in this Petition were already placed before the Panel, and since this is the last opportunity for judicial review of the determination and Opinion which otherwise stands

uncorrected for all time, in fairness reconsideration should not be limited to the same Panel of this Court but should be *in banc.*

The "Phantom" Flocks
Flocks A-1, A-2, B-1 and C-1

The judgment should have been reversed as to four of the seven flocks in issue—the four flocks designated "phantom" flocks because they were no longer in existence in August 1972, when extraordinary obesity and fatty liver syndrome were diagnosed by plaintiff's experts in the flocks then occupying the Vermont complex. The Court failed to draw the necessary distinction between the two discrete groups of plaintiff's flocks: the four "phantom" flocks (A-1, A-2, B-1 and C-1) on the one hand, and the three "fat" flocks (B-2, C-2 and Dostie) on the other.

There was actual direct proof—hard evidence—that the three flocks in existence in August 1972 were overwhelmingly obese and suffered from fatty liver syndrome. These conditions were attributed to defendant's feed, as the only source of excess calories. In turn, the obesity and fatty liver syndrome were linked by inferences and testimony to lowered egg production. The Court concluded that there was "ample evidence" to tie the obesity or fatty liver syndrome to defendant's feed, and "definite evidence" that fatty liver syndrome was accompanied by lowered egg production (Opinion, p. 2470). But the existence of gross obesity and fatty liver syndrome was the fundamental fact upon which plaintiff's injury and defendant's liability rested.

As noted in the Opinion, the record established that the three flocks were, even to the eye, "extraordinarily fat" (Opinion, p. 2468). Autopsies showed them to be "grossly obese, excessively fat and slippery, and greasy to handle" (Opinion, p. 2468). Their livers were "yellow" and "fri-

able", "evidencing hemorrhages and numerous fat cells replacing liver cells" (Opinion, p. 2470). The abdomens of these birds were so full of fat that at the autopsy, " 'the fat in the body cavity just plunged out' " (Opinion, p. 2470 fn). If such conditions had existed in the four earlier flocks, there would certainly have been similar unappetizing descriptions of these birds. The Opinion, like the record, is devoid of any similar description of flocks A-1, A-2, B-1 or C-1. This omission from the comprehensive Opinion points up several essential facts which this Court overlooked or misapprehended.

Of plaintiff's witnesses who described the overwhelming obesity of the later flocks, even just from looking at them, not one of these very same persons who had also seen the earlier flocks testified that the "phantom" flocks looked similarly obese. By contrast, several others who actually saw these earlier flocks said they looked good. Someone surely would have observed the unprecedented obesity that existed in the three flocks had it also been present in the four "phantom" flocks. Second, twenty reports were prepared by Dr. Murray on plaintiff's flocks prior to August 1972, some of them reports of autopsies (Exhibit Volume, pp. 40-60) and, but for a single report discussed *infra*, they make no mention of obesity. Dr. Murray testified he would have noted excess fat if it had existed (Appendix, pp. 392-93).

All of these facts were summarized and fully documented in defendant's briefs (Brief, pp. 38-42; Reply Brief, pp. 3-4). In the face of the contemporaneous written and unwritten record on the "phantom" flocks, Mr. LeRiche's highly biased responses to leading questions that the earlier flocks looked "the same" or looked "fat" (a good example is actually quoted in the Opinion at p. 2471 fn), were legally insufficient to support a conclusion that the "phantom" flocks were obese or suffered from fatty liver

syndrome, and incompetent as expert testimony to support an inference concerning the cause of their egg production rates.

Since there was no proof that the "phantom" flocks were obese or had fatty liver syndrome—and indeed the only evidence established the contrary—there was no occasion for an inference* that defendant's feed was the cause of these conditions in these flocks.

Other than Mr. LeRiche's testimony, the Court recited the following facts in support of the conclusion or inference that obesity existed in the "phantom" flocks:

> "[S]ignificantly, as early as June 9, 1971, Dr. Murray from the University of Vermont had reported that 10 white birds from the Vermont flocks had an 'excess fatty condition' at 23 weeks of age (Ex. R.)." (Opinion, p. 2471).

This single report is again referred to as underpinning for the key hypothetical question (Opinion, p. 2476).**

When the Court writes that Dr. Murray reported an excess fatty condition *"as early as"* June 9, 1971, this implies that there were later reports of a similar nature regarding these flocks. But of all the twenty reports prepared by Dr. Murray on plaintiff's flocks prior to his reports on B-2 and C-2 beginning in August 1972, Exhibit R is the *only* report that refers to an excess fatty condition (Exhibit Volume, pp. 40-60; Appendix, pp. 392-93).

Further, to suggest that a single report of excess fatty condition in 10 birds might be significant also overlooks or misapprehends the facts. A single report on 10 birds out

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* The Court acknowledged that there was only an *inference*, to be sure, in respect to the "phantom" flocks. (Opinion, p. 2472).

** For the same reasons discussed herein, Dr. Hoffman's expert opinion regarding the "phantom" flocks should have been excluded; the question lacked necessary support in the record.

of 95,924 (the total number of chickens in the four "phantom" flocks) can hardly be called significant by any standard. As Exhibit R shows (Exhibit Volume, p. 51), certain of the 10 birds reported on were even suffering from other diseases. The overwhelming record—the 19 other reports and 95,914 other birds—speak forcibly to the point.

Finally, the Court overlooked the testimony given by Dr. Murray that shortly after the examination he reported in Exhibit R, he examined samples from this same flock and no excess weight was noted (Exhibit S (Exhibit Volume, p. 52); Appendix, pp. 394-95; Brief, p. 11).

The "Life Cycle" Program

The Opinion contains an extensive discussion of defendant's new four-phase, reduced protein "Life Cycle" feeding program, which was introduced nationally by defendant in Spring 1971 (Appendix, p. 326), and which plaintiff first began using at its Vermont complex in late 1971 (Opinion, p. 2467; Defendant's Brief, p. 5; Reply Brief, p. 5). The Court found there was sufficient basis for the inference and conclusion that defendant's new feed caused plaintiff's chickens to get too fat, the feed having too high a proportion of energy or calories that was not sufficiently compensated for by a proper amino acid balance (Opinion, p. 2473). As Mr. LeRiche testified, before his birds were started on "Life Cycle" feed they were good plump birds, but "after they were started on the Life Cycle feed of appellant's, they all became fat and low producers." (Opinion, p. 2471).

The new "Life Cycle" feed, contrary to the Opinion, simply could not have caused lowered egg production in the four flocks throughout the damage period. The lowered protein levels and other qualities of the "Life Cycle" pro-

gram described by the Court, could not have been the cause of injury in these flocks.

By the time plaintiff's chicken were put on the new "Life Cycle" feed, one of the four flocks (B-1) was already gone, and the other three (A-1, A-2, C-1) were well into their laying cycles and already alleged low producers. This fact is readily documented by reference to the table contained in the Opinion at page 2468. Flock B-1 obviously could not have received "Life Cycle" feed during the damage period (July 1970 to August 1971), since "Life Cycle" feed was not even on the market until Spring 1971 and not at the Vermont complex until late 1971. The damage period on flock C-1 (January 1971 to February 1972) likewise began several months before "Life Cycle" even appeared on the market.

The Absence of Similar Complaints

The Court easily dismissed defendant's plea for the admissibility of testimony regarding the absence of similar complaints because it overlooked every factual support for the legal argument.

In concluding that the "many variables" in the feed content diminished the relevance and probative value of this evidence, the Court disregarded the fact that nutritional standards in defendant's feed—the very point at issue in this case—were by design uniform (Brief, p. 20). This fact distinguishes the present case from *Fortunato* v. *Ford Motor Co.*, 464 F.2d 962 (2d Cir.), *cert. denied*, 409 U.S. 1038 (1972), and makes such testimony relevant and probative. This is not a case involving a defect in one automobile, or one lot of feed, where the experience of other customers would not necessarily be relevant, but a case attacking the design of a standardized product. Particularly because plaintiff's case was so dependent on inferences, the evidence should have been received.

The Court cited the fact that plaintiff received a "special" mix as a reason for excluding this testimony. This point is curious, since what was at issue in all other respects was defendant's "Life Cycle" program. If the feed plaintiff received was something different, what was the relevance of all the proof—and the extensive discussion in the Opinion—regarding "Life Cycle" feed? The only proof as to how plaintiff's special mix was "special" was that it contained one additional percentage point of protein. Since reduced protein levels were identified as a problem in defendant's feed, testimony that no complaints were received even at lower protein levels than plaintiff received would have been highly relevant.

In concluding that the offer was not relevant or probative because of the specific questions proffered, or the fact that complaints might have been made and resolved locally, the Court overlooked further facts. Defendant offered not only the testimony of its national complaint manager as to the absence of complaints, but also the testimony of its local representative (Appendix, p. 390). As to the proffered questions themselves, while they undoubtedly could have been better drawn, it is clear from the record (Appendix, pp. 382; 390) that what was offered and rejected was defendant's proof, in substance, that not a single complaint other than plaintiff's had been received. The Court's speculation that defendant's size or position might have scared off complaints is contradicted by this very case since this plaintiff had registered two separate complaints, and they reached the complaint manager. In any event such factors, which might through cross-examination have diminished the weight of the proffered testimony, should not have resulted in its preclusion, since it was fundamentally relevant and probative.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the Petition for Rehearing should be granted in all respects.

April 4, 1975.

Respectfully submitted,

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Certificate of Counsel

I, JUDITH S. KAYE, a member of the firm of Olwine, Connelly, Chase, O'Donnell & Weyher, attorneys for the appellant in this action, do hereby certify that the foregoing Petition for Rehearing for this cause is presented in good faith and not for purpose of delay.

JUDITH S. KAYE.

ourt Press Form No. 2-Affidavit.
H.15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

VERMONT FOOD INDUSTRIES, INC.,

Plaintiff-Appellee,

against

RALSTON PURINA COMPANY,

Defendant-Appellant.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON being duly sworn, deposes and says that he is over the age of 18 years. That on the 4th day of April, 1975, he served two copies of the Petition for Rehearing on Richard E. Davis Associates, Inc.

the attorney for the Plaintiff-Appellee by depositing the same, properly enclosed in a securely sealed post-paid wrapper, in a Branch Post Office regularly maintained by the Government of the United States at 90 Church Street, Borough of Manhattan, City of New York, directed to said attorney at No. P. O. Box 666, Barre, Vermont 05641 ( ) N.Y., that being the address designated by him for that purpose upon the preceding papers in this action.

David F. Wilson

Sworn to before me this
4th day of April, 1975.

Courtney J. Brown
COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976